59.

SUPREME COURT OF THE UNITED STATES.

No. 86.

SAMUEL THURLOW, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF MASSACHUSETTS.

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

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J. & G. S. Gideon, printers.

COMMONWEALTH OF MASSACHUSETTS:

To the Commonwealth of Massachusetts, and to James T. Austin, attorney general for the Commonwealth of Massachusetts, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be begun and holden at Washington, in the District of Columbia, on the second Monday of January instant, pursuant to a writ of error filed in the clerk's office of this court, wherein Samuel Thurlow, of Georgetown, in the county of Essex, and State of Massachusetts, is plaintiff in error, and the said Commonwealth of Massachusetts is defendant in error, to show cause, if any there be, why the judgment against the said Thurlow, in the said writ of error mentioned, should not be corrected, and speedy justice done to the parties in that behalf.

Witness the honorable Lemuel Shaw, chief justice of the supreme judicial court of Massachusetts, this ninth day of January, in the year of our Lord eighteen hundred forty-three.

LEMUEL SHAW,
Ch. Just. Sup. Jud. Court.

SUFFOLK, *ss.*

Sheriff's Office, Boston, January 9th, 1843.

I hereby certify, that I this day served upon James T. Austin, esquire, attorney general of the State of Massachusetts, within named, a true and attested copy of the within monition, by giving said copy in hand to said Austin.

JOSEPH EVELITH,
Sheriff of the county of Suffolk.

Fees for service and copy, $1.

UNITED STATES, *ss.*

The President of the United States to the judges of the supreme judicial court, holden in and for the county of Essex, in the commonwealth of Massachusetts, greeting: [L. S.]

Because that in the record and process, and also in the rendition of judgment, in a suit before you, or some of you, between the Commonwealth of Massachusetts, plaintiff, and Samuel Thurlow, defendant, in a plea of indictment a manifest error has intervened, to the great damage of the said Thurlow, as in his complaint has been stated; and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that, if judgment thereof be given, then under your seal you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them, and this writ, so that you have the same before the chief justice and the associate justices of the Supreme Court of the United States, on

the second Monday of January instant, at Washington, being the present seat of the National Government, that the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Allowed by Lemuel Shaw, Ch. J. S. J. C.

Witness the honorable Roger B. Taney, esquire, chief justice of the said Supreme Court, at Washington aforesaid, this second day of January, in the year of our Lord one thousand eight hundred and forty-three, and of the independence of the United States the sixty-seventh.

FRANCIS BASSETT,
Clerk of the Circuit Court of U. S. Mass Dist.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, ss.

In obedience to the within precept to us directed, we send to the honorable chief justice, and the honorable the associate justices of [L. S.] the Supreme Court of the United States of America, distinctly and openly, the record and process of the suit of the Commonwealth of Massachusetts, plaintiff, and Samuel Thurlow, defendant, with all things touching the same, and have annexed the same to this writ.

Witness my hand and seal at the city of Boston, this ninth day of January, in the year eighteen hundred and forty three.

LEMUEL SHAW,
Chief Justice of the Sup. Judicial Court.

UNITED STATES OF AMERICA, *Supreme Court.*

SAMUEL THURLOW, Plf. in Error,
vs.
COMMONWEALTH of MASSACHUSETTS,
Deft. in Error.

Assignment of Errors.

On a judgment of the supreme judicial court, begun and holden at Salem, within and for the county of Essex, and State of Massachusetts, on the second Tuesday, being the eighth day of November, in the year one thousand eight hundred and forty-two, wherein the said Commonwealth of Massachusetts, by James T. Austin, attorney general of said commonwealth, is prosecutor, and the said Samuel Thurlow, defendant, the said Thurlow prays for a writ of error to issue, returnable to the next term of the Supreme Court for the United States of America, to be begun and holden at the city of Washington, in the District of Columbia, and assigns for error in the records of process and judgment aforesaid, founded on certain statutes of the said Commonwealth of Massachusetts, and the construction thereof by the said supreme judicial court, the following, to wit: That the judgment rendered in the said supreme judicial court of Massachusetts in this case, it being the highest court of law and equity of the said State in which a decision could be had in said case, should be reversed, for the reasons following, viz:

That the several acts of the Legislature of Massachusetts concerning

licensed houses and the sale of intoxicating liquors, and especially the acts which are hereto appended and set out as part of the record in the said cause, upon which said judgment was founded, and also the opinion and judgment of said supreme judicial court of Massachusetts, in the application and construction of said acts to the sales of imported foreign liquors and spirits by the said Thurlow, are repugnant to, and inconsistent with, the provisions of the constitution, treaties and laws of the United States, in so far as the said acts, and the construction thereon by the said supreme judicial court of Massachusetts, prohibit, restrain, control, or prevent the sale of imported wines and spirituous liquors, by retail or otherwise, in the said State of Massachusetts, and are therefore void.

There is error also in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said Commonwealth against the said Samuel Thurlow, whereas by the law of the land the said judgment ought to have been given for the said Thurlow against the said Commonwealth; and the said Samuel Thurlow prays that the judgment aforesaid for the errors aforesaid, and other errors in the record and proceedings, and the matters herein set forth, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of said judgment.

SAMUEL THURLOW,
By B. F. HALLETT,
Attorney for him, Samuel Thurlow.

Revised Statutes of Massachusetts—Chap. 47, of the regulation of Licensed Houses.

Section 1. No person shall presume to be an inn-holder, common victualler, or seller of wine, brandy, rum, or any other spirituous liquor, to be used in or about his house, or other buildings, unless he is first licensed as an inn-holder, or common victualler, according to the provisions of this chapter, on pain of forfeiting one hundred dollars.

Section 2. If any person shall sell any wine or spirituous liquor, or any mixed liquor, part of which is spirituous, to be used in or about his house or other buildings, without being duly licensed as an inn-holder, or common victualler, he shall forfeit for each offence twenty dollars.

Section 3. No person shall presume to be a retailer or seller of wine, brandy, rum, or other spirituous liquors, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is [at] first licensed as a retailer of wine and spirits, as is provided in this chapter, on pain of forfeiting twenty dollars for each offence.

Section 4. If any person, licensed to be a retailer as aforesaid, shall sell any of the above liquors, either mixed or unmixed, to be used in or about his house or shop, he shall forfeit for each offence twenty dollars.

Section 5. Every inn-holder shall at all times be furnished with suitable provisions and lodging for strangers and travellers, and with stable room, hay and provender, for their horses and cattle; and if he shall not be at all times so provided, the county commissioners may revoke his license.

Section 6. Every common victualler shall have all the rights and privileges, and be subject to all the duties and obligations of inn-holders, excepting that he shall not be required to furnish lodgings for travellers, nor stable room, hay and provender, for horses and cattle.

Section 7. Every inn-holder and common victualler shall at all times have a board or sign affixed to his house, shop, cellar, or store, or in some conspicuous place near the same, with his name at large thereon, and the employment for which he is licensed, on pain of forfeiting twenty dollars.

Section 8. If any inn-holder shall, when requested, refuse to receive and make suitable provisions for strangers and travellers, and their horses and cattle, he shall, upon conviction thereof before the court of common pleas, be punished by a fine not exceeding fifty dollars, and shall also, by order of the said court, be deprived of his license; and the court shall order the sheriff or his deputy forthwith to cause his sign to be taken down.

Section 9. No inn-holder, or common victualler, shall have or keep in or about his house, or other buildings, yards, and gardens, or dependencies, any dice, cards, bowls, billiards, quoits, or other implements used in gaming, nor shall suffer any person resorting thither, to use or exercise any of said games, or any other unlawful game or sport within his said premises, on pain of forfeiting ten dollars for every such offence.

Section 10. Every person convicted of using or exercising any of the games aforesaid, in or about any such house or building of an inn-holder, or common victualler, shall forfeit ten dollars.

Section 11. No inn-holder or common victualler shall suffer any person to drink to drunkenness or excess in his premises, nor suffer any minor or servant, travellers excepted, to have any strong drink there, on pain of forfeiting five dollars for each offence.

Section 12. If any inn-holder or common victualler shall trust or give credit to any person for liquor, he shall lose and forfeit all the sums so trusted or credited, and all actions brought for such debt shall be utterly barred; and the defendant in such action may plead the matter specially, or may give it in evidence under the general issue.

Section 13. If any common victualler shall keep open his house, cellar, shop, store, or place of business on any part of the Lord's day, or evening, or at a later hour than ten of the clock in the evening of any other day of the week, and entertain any person therein, by selling him any spirituous or strong liquor, he shall forfeit for each offence ten dollars.

Section 14. When any person shall, by excessive drinking of spirituous liquors, so mis-spend, waste, or lessen his estate, as thereby either to expose himself or his family to want or indigent circumstances, or the town to which he belongs to expense for the maintenance of him or his family, or shall so habitually indulge himself in the use of spirituous liquors as thereby greatly to injure his health or endanger the loss thereof, the selectmen of the town in which such spendthrift lives shall, in writing under their hands, forbid all licensed inn-holders, common victuallers, and retailers of the same town, to sell to him any spirituous or strong liquors aforesaid for the space of one year; and they may in like

manner forbid the selling of any such liquors to the said spendthrift by the said licensed persons of any other town to which the spendthrift may resort for the same; and the city clerk of the city of Boston shall, under the direction of the mayor and aldermen thereof, issue a like prohibition as to any such spendthrift in the said city.

Section 15. The said mayor and aldermen, and said selectmen, shall, in the same manner, from year to year, renew such prohibition as to all such persons as have not in their opinion reformed within the year; and if any inn-holder, common victualler, or retailer, shall, during any such prohibition, sell to any such prohibited person any such spirituous liquor, he shall forfeit for each offence twenty dollars.

Section 16. When the said mayor and aldermen, or selectmen, in execution of the foregoing provisions, shall have prohibited the sale of spirituous liquors to any such spendthrift, if any person shall, with a knowledge of said prohibition, give, sell, purchase, or procure, for and in behalf of such prohibited person, or for his use, any such spirituous liquors, he shall forfeit for each offence twenty dollars.

Section 17. The commissioners in the several counties may license, for the towns in their respective counties, as many persons to be inn-holders, or retailers therein, as they shall think the public good may require; and the mayor and aldermen of the city of Boston may, in like manner, license inn-holders and retailers in the said city; and the court of common pleas in the county of Suffolk may, in like manner, license inn-holders and retailers in the town of Chelsea; and every license, either to an inn-holder or retailer, shall contain a specification of the street, lane, alley, or the place and the number of the building, or some other particular description thereof, where such licensed persons shall exercise his employment; and the license shall not protect any such person from the penalties provided in this chapter for exercising his employment in any other place than that which is specified in the license.

Section 18. The mayor and aldermen of the city of Boston may license, for the said city, as many persons to be common victuallers as they shall think the public good may require; and every such license shall contain such a specification or description, as is mentioned in the preceding section, of the street or other place, and of the building where the licensed person shall exercise his employment; and the license shall not protect him from the penalties provided in this chapter for exercising it in any other place.

Section 19. All license to any inn-holder, retailer, or common victualler, shall expire on the first day of April in each year; but any license may be granted or renewed at any time during the preceding month of March, to take effect from the said first day of April, and after that day they may be granted for the remainder of the year, whenever the officers authorized to grant the same shall deem it expedient.

Section 20. Every person, who shall be licensed as before provided in this chapter, shall pay therefor to the clerk of the city of Boston, the clerk of the court of common pleas for the county of Suffolk, or to the clerk of the commissioners of the respective counties so licensing said person, one dollar, which shall be paid by said clerks to the treasurers

of their respective counties for the use of said counties; and such persons shall also pay twenty cents to the use of the said clerks respectively; and no other fee or excise whatever shall be taken from any person applying for or receiving a license under the provisions of this chapter.

Section 21. Any license to an inn-holder, retailer, or common victualler, may be so framed as to authorize the licensed person to sell wine, beer, ale, cider, or any other fermented liquors, and not to authorize him to sell brandy, rum, or any other spiritous liquor; and no excise or fee shall be required for such a license.

Section 22. The clerk of the commissioners in the several counties shall seasonably, before the time for granting licenses in each year, transmit to the selectmen of every town within the county, a list of the persons in such town who were licensed as inn-holders or retailers the preceding year.

Section 23. No license shall be granted or renewed to any person, unless he shall produce a certificate from the selectmen of the town for which he applies to be licensed, in substance as follows, to wit: We, the subscribers, a majority of the selectmen of the town of , do hereby certify that has applied to us to be recommended as (here expressing the employment, and a particular description of the place for which the license is applied for) in the said town, and that, after mature consideration had thereon, at a meeting held for that purpose, at which we were each of us present, we are of opinion, that the petition of said be granted, he being, to the best of our knowledge and belief, a person of good moral character.

Section 24. Any person, producing such certificate of the selectmen, shall be heard, and his application decided upon, either on a motion made orally by himself or his counsel, or upon a petition in writing, as he shall elect.

Section 25. If the selectmen of any town shall unreasonably neglect or refuse to make and deliver such a certificate, either for the original granting or the renewal of a license, the person aggrieved thereby may apply for a license to the commissioners, first giving twenty-four hours notice to a majority of the said selectmen of his intended application, so that they may appear, if they see fit, to object thereto; and if on such application it shall appear that the said selectmen did unreasonably neglect or refuse to give the said certificate, and that the public good requires that the license should be granted, the commissioners may grant the same.

Section 26. All the fines imposed by this chapter may be recovered by indictment, to the use of the county where the offence is committed; and when the fine does not exceed twenty dollars, the offence may be prosecuted before a justice of the peace, subject to the right of appeal to the court of common pleas, as in other cases.

Section 27. When any person shall be convicted under the provisions of this chapter, and shall fail to pay the fine awarded against him, he may be imprisoned in the common jail for a time not exceeding ninety days, at the discretion of the court or justice before whom the trial may be had.

Section 28. All prosecutions, under the provisions of this chapter, for offences committed in the city of Boston, (excepting where the fine exceeds twenty dollars,) may be heard and determined in the police court, subject to the right of appeal to the municipal court; but the said police court shall not have power, in any such case, to sentence any person to imprisonment, except as provided in the preceding section.

Section 29. Any person, licensed under the provisions of this chapter, who shall have been twice before convicted of a breach of any of the said provisions, shall thereupon, in addition to the penalties before provided, be liable to a further punishment, by imprisonment in the common jail, for a time not exceeding ninety days, at the discretion of the court before whom the trial may be had.

Acts of 1837, *chapter* 242.

"An act concerning licensed houses, and the sale of intoxicating liquors.

Be it enacted by the senate and house of representatives in general court assembled, and by the authority of the same, as follows:

Sec. 1. No licensed inn-holder, or other person, shall sell any intoxicating liquor on Sunday, on pain of forfeiting twenty dollars for each offence, to be recovered in the manner and for the use provided in the twenty-sixth section of the forty-seventh chapter of the revised statutes.

Sec. 2. Any license to an inn-holder, or common victualler, may be so framed as to authorize the licensed person to keep an inn or victualling house without authority to sell any intoxicating liquor, and no excise or fee shall be required for such license: *Provided*, that nothing contained in this act, or in the forty-seventh chapter of the revised statutes, shall be so construed as to require the county commissioners to grant any licenses, when in their opinion the public good does not require them to be granted.

Sec. 3. Any person who shall have been licensed according to the provisions of the forty-seventh chapter of the revised statutes, or of this act, and who shall have been twice convicted of a breach of this act or of that chapter, shall, on such second conviction, in addition to the penalties prescribed for such offence, be adjudged to have forfeited his license.

Sec. 4. Any person who shall have been three times convicted of a breach of this act, or of the forty-seventh chapter of the revised statutes, shall, upon such third conviction, in addition to the penalties in this act and said chapter provided, be liable to be imprisoned in the common jail, for a time not exceeding ninety days, at the discretion of the court before whom the trial may be had.

Sec. 5. The secretary of this commonwealth shall cause a condensed summary of all laws relating to inn-holders, retailers and licensed houses, to be printed for the use of this commonwealth, and he shall supply the county commissioners for the several counties, and such other officers as by law are authorized to grant licenses, with the same; and the said commissioners, or other officers, whenever they grant any license, shall furnish each person so licensed with one copy of said license laws, to

the end that such person may know to what duties, restrictions, and liabilities he is subjected by law."

[Approved by the Governor, April 20, 1837.]

COMMONWEALTH OF MASSACHUSETTS, *Essex*, *ss.*

At the supreme judicial court begun and held at Salem, within and for the county of Essex, on the second Tuesday, being the eighth day, of November, in the year one thousand eight hundred and forty-two.

The jurors for the commonwealth of Massachusetts upon their oath present, that Samuel Thurlow, of Georgetown, in said county, trader, on the first day of May, in the year of our Lord one thousand eight hundred and forty-two, at said Georgetown, he not being then and there first licensed as a retailer of wine and spirits, as provided in the forty-seventh chapter of the revised statutes of said commonwealth, and without any license therefor duly had according to law, did presume to be, and was, a retailer of wine, brandy, rum, and spirituous liquors, to one Samuel Goodale, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell to said Goodale two quarts of spirituous liquors, and no more, against the peace of said commonwealth, and the form of the statute in such case made and provided.

2. And the jurors aforesaid upon their oath aforesaid do further present, that said Samuel Thurlow on the first day of January, in the year of our Lord one thousand eight hundred and forty-two, at said Georgetown, he not being then and there first licensed as a retailer of wine and spirits, as provided in the forty-seventh chapter of the revised statutes of said commonwealth, and without any license therefor duly had according to law, did presume to be, and was, a retailer of wine, brandy, rum and spirituous liquors, to one Samuel Goodale, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell to said Goodale two quarts of spirituous liquors, and no more, against the peace of said commonwealth, and the form of the statute in such case made and provided.

3. And the jurors aforesaid upon their oath aforesaid do further present, that said Samuel Thurlow on the first day of December, in the year of our Lord one thousand eight hundred and forty-one, at said Georgetown, he not being then and there first licensed as a retailer of wine and spirits, as provided in the forty-seventh chapter of the revised statutes of said commonwealth, and without any license therefor duly had according to law, did presume to be, and was, a retailer of wine, brandy, rum and spirituous liquors, to one Samuel Goodale, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, by then and there selling to said Goodale two quarts of spirituous liquor, and no more, against the peace of said commonwealth, and the form of the statute in such case made and provided.

4. And the jurors aforesaid upon their oath aforesaid do further present, that said Samuel Thurlow, on the first day of September, in the year of our Lord one thousand eight hundred and forty-one, at said

Georgetown, he not being then and there first licensed as a retailer of wine and spirits, as provided in the forty-seventh chapter of the revised statutes of said commonwealth, and without any license therefor duly had according to law, did presume to be, and was, a retailer of wine, brandy, rum and spirituous liquors, to one Paul Smith, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell to said Smith two quarts of spirituous liquor, and no more, against the peace of said commonwealth, and the form of the statute in such case made and provided.

5. And the jurors aforesaid upon their oath aforesaid do further present, that said Samuel Thurlow, on the first day of January, in the year of our Lord one thousand eight hundred and forty-two, at said Georgetown, he not being then and there first licensed as a retailer of wine and spirits, as provided in the forty-seventh chapter of the revised statutes of said commonwealth, and without any license therefor duly had according to law, did presume to be, and was, a retailer of wine, brandy, rum and spirituous liquors, to one Paul Smith, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell to said Smith two quarts of spirituous liquor, and no more, against the peace of said commonwealth, and the form of the statute in such case made and provided.

6. And the jurors aforesaid upon their oath aforesaid do further present, that said Samuel Thurlow, on the first day of February, in the year of our Lord one thousand eight hundred and forty-two, at said Georgetown, he not being then and there first licensed as a retailer of wine and spirits, as provided in the forty-seventh chapter of the revised statutes of said commonwealth, and without any license therefor duly had according to law, did presume to be, and was, a retailer of wine, brandy, rum and spirituous liquors, to one Paul Smith, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell to said Smith two quarts of spirituous liquor, and no more, against the peace of said commonwealth, and the form of the statute in such case made and provided.

7. And the jurors aforesaid upon their oath aforesaid do further present, that said Samuel Thurlow, on the fifteenth day of December, in the year of our Lord one thousand eight hundred and forty-one, at said Georgetown, he not being then and there first licensed as a retailer of wine and spirits, as provided in the forty-seventh chapter of the revised statutes of said commonwealth, and without any license therefor duly had according to law, did presume to be, and was, a retailer of wine, brandy, rum and spirituous liquors to one Samuel Balch, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, against the peace of said commonwealth, and the form of the statute in such case made and provided.

8. And the jurors aforesaid upon their oath aforesaid do further present, that said Samuel Thurlow, on the fifteenth day of November, in the year of our Lord one thousand eight hundred and forty-one, at said Georgetown, he not being then and there first licensed as a retailer of

wine and spirits, as provided in the forty-seventh chapter of the revised statutes of said commonwealth, and without any license therefor duly had according to law, did presume to be, and was, a retailer of wine, brandy, rum and spirituous liquors, to one Samuel Balch, in a less quantity than twenth-eight gallons, and that delivered and carried away all at one time, and did then and there sell to said Balch two quarts of spirituous liquor, and no more, against the peace of said commonwealth, and the form of the statute in such case made and provided.

9. And the jurors aforesaid upon their oath aforesaid do further present, that said Samuel Thurlow, on the first day of May, in the year of our Lord one rhousand eight hundred and forty-two, at said Georgetown, he not being then and there first licensed as a retailer of wine and spirits, as provided in the forty-seventh chapter of the revised statutes of said commonwealth, and without any license therefor duly had according to law, did presume to be, and was, a retailer of wine, brandy, rum and spirituous liquors, to one Joseph Saunders, in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell to said Saunders two quarts of spirituous liquors, and no more, against the peace of said commonwealth, and the form of the statute in such case made and provided.

This indictment was found in the court of common pleas at June term last, and upon the trial there the said Thurlow was found guilty on the first, second, fourth, fifth, sixth, seventh, eighth and ninth counts, and not guilty on the third count of the indictment. Thereupon the said Thurlow alleged the following exceptions:

"1. This was an indictment under the license law, and the indictment is part of the case. The commonwealth, after calling witnesses to prove specific sales, called a witness to prove that he had conveyed casks containing, he believed, spirits from a distillery in Newburyport to the defendant. To this evidence the defendant objects, as irrelevant and foreign to the issue, but the judge admitted the evidence. To this ruling the defendant excepts.

2. It appeared upon the trial that some of the sales charged in the indictment were of foreign liquors, and his honor directed the jury that the license law of this commonwealth applied as well to imported spirits as to domestic, and that this commonwealth could constitutionally control the sale of foreign spirits by retail, and that said law is not inconsistent with constitution or revenue laws of the United States. To this ruling also the defendant excepts.

In the first and ninth counts of the indictment, the quantity alleged to be sold is two quarts and no more, the quantity proved was one gallon. His honor ruled that this was not a variance. To this ruling also the defendant excepts.

In the 4th, 5th, 6th, and 8th counts, the quantity alleged is two quarts and no more, the quantity proved was one pint. The judge also ruled that this was no variance. To this ruling also the defendant excepts."

Which said exceptions being then and there examined by the court, and found to be conformable to the truth of the case, were allowed; and thereupon the indictment was removed to this court.